

Remarks

Claims 1-3 & 5-12 are at issue. Claims 1-2, 6-8 and 10-11 stand rejected under 35 USC 103(a) as being allegedly unpatentable over Stanfield (5,371,340) in view of Feibus (5,685,257) and Hughes (US Pat. 6,256,257). Claims 3 and 9 stand rejected under 35 USC 103(a) as being allegedly unpatentable over Stanfield (5,371,340) in view of Feibus (5,685,257) and Hughes (US Pat. 6,256,257) and Brigham (US Pat. 4,429,216). Claim 5 stands rejected under 35 USC 103(a) as being allegedly unpatentable over Stanfield (5,371,340) in view of Feibus (5,685,257) and Hughes (US Pat. 6,256,257) and further in view of Rau et al (US Pat. 5,814,257). Claim 12 stands rejected under 35 USC 103(a) as being allegedly unpatentable over Stanfield (5,371,340) in view of Feibus (5,685,257) and Hughes (US Pat. 6,256,257) and Brigham (US Pat. 4,429,216) and further in view of Graflind.

Law

The Patent and Trademark Office ("PTO") determines the scope of the claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction "in light of the specification as it would be interpreted by one of ordinary skill in the art." In re Am. Acad. Of Sci. Tech. Ctr., 367 F.3d 1359 (Fed. Cir. 2004). Indeed, the rules of the PTO require that application claims must "conform to the invention as set forth in the remainder of the specification and the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the means of the terms in the claims may be ascertainable by reference to the description." 37 C.F.R. 1.75(d)(1). Edward H. Phillips v. AWH Corp (Fed. Cir. 2005).

The independent claims all require "truncated semicircle" for the shape of the pad. This is shown in FIG. 2 and in FIG. 4. This is discussed on page 4, lines 9-14 as "The heated pet mat 20 has covering 22 that is in the form of a truncated semicircle. The truncated semicircle is a semicircle 24 having a radius 26. The ends 28 and 30 of the semicircle shown in dashed lines have been removed from the semicircle 24. Note that it would be possible to use a semicircle on top of a rectangle, but this would increase the

amount of wasted covering material.” Note that a “truncated semicircle” is defined as a semicircle with the ends 28, 30 removed or squared off. The purpose of the “truncated circle” is discussed on page 5, lines 9-15 as “The sheet of plastic 60 is cut to form either two truncated semicircles 62, 64 or as a truncated circle 66. The truncated circle 66 can be folded to form the two layers of the outer cover of the heated pet mat. The shaded parts 68 of the sheet of plastic 60 are the wasted material. This design significantly reduces the amount of wasted material 68 compared to a full circular design or to full semicircles. This allows the heated pet mat to be produced economically.” As stated in the “Background” Section the waste associated with a semicircular or round designs has priced these designs out of the market. (Page 1, lines 21-24)

The law requires the PTO to interpret the term “truncated circle” or “truncated semi-circle” as one skilled in the art who had read the specification would have done. For the PTO to suggest that any of the prior art references cited by the PTO show this feature is completely arbitrary and capricious and fails the laugh test.

In the Office Action dated 6/30/08, page 3, the PTO suggests that the exact shape of the pillow is well within the design capabilities of someone skilled in the art. This statement standing alone is meaningless. The question is whether “one skilled in the art”, at the time the present application was filed, faced with the problem of making an economically feasible pet heating pad for an igloo style doghouse would have found the solution of a “truncated semicircle” or “truncated circle”. After the fact, it is clear that making a “truncated semicircle/circle” is well within the skill of one in the art. In fact, this is a requirement of 35 USC 112, first paragraph. The attached declaration makes it clear that many people skilled in the art were trying to make a heated pet pad for igloo style doghouses. Only Mr. Koskey came up with the solution of a “truncated semicircle/circle” for the pad that made it possible to make these heated pet pads that meets the market needs.

Policy

The purpose the patent system is to “promote the useful arts and sciences.” Mr. Koskey has invented a unique heated pet pad to solve the problem of an economical heated pet pad for igloo doghouses. As the attached declaration makes clear, this was a real problem for the useful arts of animal habitation. Many companies/people had an incentive to solve this problem and only Mr. Koskey came up with a working solution. For instance, Dockcil Manufacturing is the company that makes Dogloo Doghouses. They make most of the Igloo shaped doghouses in the world. This company also makes heated pet mats and heated pet beds. They make heated pet mats that fit into all their square or rectangle shaped dog houses but have never made a heated mat that fits into their own Dogloo or Igloo shaped house, even though the igloo shape is the best selling style dog house in the US. This is because they have not figured out how to affordably make a heated mat to fit this house.

If this patent application is not allowed, the competitors of K&H Manufacturing will be able to free ride on K&H’s research and development. In addition, the competitors will not be required to take the same marketing risk that K&H took to bring an unknown product to market. The competitors can simply reverse engineer K&H’s product and offer their copycat version to the same customers as K&H. As a result, K&H will receive no benefit for having spent the time and money to innovate, i.e., promote the useful arts.

If the patent application is allowed, then the competitors will still be able to make heated pet beds that are rectangular or circular or even semicircular. At present every heated pet bed on the market is rectangular, so the public will not suffer from existing group of products being removed from the market.

Thus it is clear that if the PTO rejects the present application it is not fulfilling its constitutional purpose of “promoting the useful arts and sciences.”

Illegal Additional Standard of Patentability

According to 35 USC 102 “a person shall be entitled to a patent” unless the PTO can show that it is not novel or nonobvious. The Patent Office has arbitrarily added another illegal requirement: namely that the overall allowance rate has to be below a threshold only known to the PTO.

According to Jon Dudas, Director of the US Patent and Trademark Office (USPTO), the allowance rate for patent applications is 42%, down from around 70% in 2001. Mr. Dudas has been proudly broadcasting this sudden decrease in the allowance rate as showing that patent quality has increased. It appears that in order for the USPTO to achieve this incredibly low allowance rate, it has added an additional rule for obtaining a patent. This rule is that patent applications must not only meet the requirements of novelty and non-obviousness (35 USC 102, & 103), but must meet some arbitrary standard of the percentage of patents that may be allowed.

The USPTO has ignored the clear statutory language regarding patents and surreptitiously added an additional requirement to obtain a patent. The law states “a person shall be entitled to a patent” if they meet the statutory requirements, 35 USC 102. Unlike many other federal agencies, the USPTO does not have substantive rule making authority, as was affirmed in the recent case *Triantafyllos Taras v. Jon W. Dudas*, 1:07cv846 (2008). This means that the USPTO cannot alter the rules required to obtain a patent. The USPTO only has the authority to change procedural rules. However, the change in allowance rate from around 70% in 2001 to around 40% in 2007 strongly suggests that the USPTO has engaged in illegal substantive rule making. According to a Commerce Department report¹ on the USPTO, two of the key quality metrics the USPTO uses are the examiner allowance rate and the examiner grant rate. The report states “**the assumption being that the lower the rates, the more rigorous the examination process.**” The only possible reason for tracking individual examiner allowance rates is to evaluate the examiner’s performance. As a result, an examiner with a higher allowance rate than average will be deemed to be doing poor quality work. This results in the examiner considering not only the statutory requirements for obtaining a patent when reviewing an application, but whether allowing an application will cause their allowance rate to be out of line with the average or some other USPTO allowance goal. Similar pressures apply to the supervisory examiners and the Patent Board of Appeals. The goal of a lower allowance rate inserts an additional substantive rule to obtaining a patent. Namely, the invention embodied in the patent application must be one the top certain percentage (e.g. top 40%) of invention in order to receive a

patent. This is in clear violation of the statute and overturns 150 years of patent jurisprudence in the US.

¹ U.S. Department of Commerce Office of Inspector General, "USPTO Should Reassess How Examiner Goals, Performance Appraisal Plans, and The Award System Stimulate and reward Examiner Production", Final Inspection report No. IPE-15722/September 2004.

Claims

The question of obviousness requires that we determine if the references, taken as a whole, would suggest the invention to one of ordinary skill in the art. *Medtronic, Inc. v. Cardiac Pacemakers, Inc.*, 721 F.2d 1563, 220 USPQ 97 (Fed. Cir. 1983).

Claim 1 requires a fire retardant covering in the shape of a truncated circle folded in half. This shape is shown in FIG.s 2 & 4 of the specification is vitally important in making an economical heated pet mat for igloo shaped doghouses, see FIG. 1. For more information please see the background section, page 1 of the specification. The PTO suggests Hughes shows a truncated circle/semi-circle. Hughes clearly shows a standard rectangular pillow – no one skilled in the art and read the specification would believe the PTO's position passes the laugh test. This must be overturned. In addition, None of the references suggest or show folding a truncated circle.

The combination of Stanfield, Febius and Hughes suggests a standard rectangular heated pet pad. Attempting to combine these references leads to contradictions. Stanfield suggest a relatively rigid housing (Col. 1, lines 56-58) with an air space. While Febius suggests a foam core and Hughes suggests a soft housing. What the PTO has attempted to do is pick out elements from the prior art references without any regard to their teaching. The PTO has "selected bits and pieces from prior patents that might be modified to fit its" conclusion. This is not the correct standard for non-obviousness. *Panduit Corp. v. Dennison Manufacturing Co.*, 810 F.2d 1561, 1 USPQ2d 1593, 1605 (Fed. Cir. 1987). Stanfield has a top sheet 12 of molded plastic bonded to a lower sheet 14 (Col. 2, lines 41-45). Both parts are rectangular and the top sheet is relatively rigid (Col. 1, line 56). Stanfield is a heated mat. Feibus is a non-heated rectangular pet mat. Hughes is a rectangular shaped heated pet bed with a soft housing. None of these references discuss the problem of making a heated pet mat for an "igloo" or round pet house. The only logical combination of the references is a heated, suspended rectangular pet mat. The combination clearly does not teach or suggest the invention of the present application. Claim 1 is clearly allowable.

Claim 2 is allowable as being dependent upon an allowable base claim.

Claim 6 further defines the shape of the mat. The question of obviousness requires that we determine if the references, taken as a whole, would suggest the

invention to one of ordinary skill in the art. *Medtronic, Inc. v. Cardiac Pacemakers, Inc.*, 721 F.2d 1563, 220 USPQ 97 (Fed. Cir. 1983). This is not shown or suggested in the prior art references.

Claim 7 requires a housing having a shape of a truncated semicircle. This shape is shown in FIG.s 2 & 4 of the specification is vitally important in making an economical heated pet mat for igloo shaped doghouses, see FIG. 1. For more information please see the background section, page 1 of the specification. The PTO suggests Hughes shows a truncated circle/semi-circle. Hughes clearly shows a standard rectangular pillow – no one skilled in the art and read the specification would believe the PTO's position passes the laugh test. This must be overturned. In addition, None of the references suggest or show folding a truncated circle.

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Claims 8 & 10-11 are allowable as being dependent upon an allowable base claim.

Claim 12 requires a housing having a shape of a truncated semicircle. This shape is shown in FIG.s 2 & 4 of the specification is vitally important in making an economical heated pet mat for igloo shaped doghouses, see FIG. 1. For more information please see the background section, page 1 of the specification. The PTO suggests Hughes shows a truncated circle/semi-circle. Hughes clearly shows a standard rectangular pillow – no one skilled in the art and read the specification would believe the PTO position passes the laugh test. This must be overturned. In addition, None of the references suggest or show folding a truncated circle.

The combination of Stanfield, Febius, Hughes, Brigman and Graflind suggests a standard rectangular heated pet pad. Attempting to combine these references leads to contradictions. Stanfield suggest a relatively rigid housing (Col. 1, lines 56-58) with an air space. While Febius suggests a foam core and Hughes suggests a soft housing. What the PTO has attempted to do is pick out elements from the prior art references without any regard to their teaching. The PTO has “selected bits and pieces from prior patents that might be modified to fit its” conclusion. This is not the correct standard for non-obviousness. *Panduit Corp. v. Dennison Manufacturing Co.*, 810 F.2d 1561, 1 USPQ2d 1593, 1605 (Fed. Cir. 1987). Stanfield has a top sheet 12 of molded plastic bonded to a lower sheet 14 (Col. 2, lines 41-45). Both parts are rectangular and the top sheet is relatively rigid (Col. 1, line 56). Stanfield is a heated mat. Feibus is a non-heated rectangular pet mat. Hughes is a rectangular shaped heated pet bed with a soft housing. None of these references discuss the problem of making a heated pet mat for an “igloo” or round pet house. The only logical combination of the references is a heated, suspended rectangular pet mat. The combination clearly does not teach or suggest the invention of the present application. Claim 7 is clearly allowable.

Prompt reconsideration and allowance are respectfully requested.

Respectfully submitted,

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